

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRIAN P. OSWALT)	
Claimant)	
)	
VS.)	
)	
BOTTORFF CONSTRUCTION CO.)	
Respondent)	Docket No. 1,018,283
)	
AND)	
)	
FEDERATED MUTUAL INS. CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 7, 2006 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on July 6, 2006.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. Matthew J. Hempy of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The nature and extent of disability claimant suffered as a result of his work-related accident was litigated. The Administrative Law Judge (ALJ) adopted the opinion of the treating physician that claimant suffered a 25 percent scheduled disability to the left foot as a result of his accidental injury on January 23, 1997.

The claimant requests review of the nature and extent of disability. Claimant argues the ALJ erred and violated the provisions of K.S.A. 44-510e(a) by substituting his personal

interpretation of the *AMA Guides*¹ in order to disregard the rating provided by claimant's medical expert.

Respondent argues the ALJ correctly disregarded the claimant's medical expert's rating because the expert was unable to explain how his rating conformed with a table in the *AMA Guides* that he said was used in forming his opinion. Respondent further argues claimant's medical expert rated the claimant's lower extremity even though the situs of claimant's disability was limited to his left foot. Consequently, respondent requests the Board to affirm the ALJ's Award.

The sole issue on review before the Board is the nature and extent of claimant's scheduled disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant suffered a severe crush injury and open fracture of his left foot on January 23, 1997, when the hydraulic bucket on a Bobcat closed on his foot. Initial attempts to suture the open wounds were unsuccessful due to excessive swelling. Claimant was transferred to Kansas University Medical Center and seen by Dr. Greg Horton, a board certified orthopedic surgeon.

Claimant suffered fractures of his first, fourth and fifth metatarsals. Dr. Horton cleaned the open wounds and placed a pin across the first fracture and treated the others. After a reduction in the swelling in his foot, the claimant was returned to surgery and the wounds were closed. The wounds healed and claimant was provided an orthopedic shoe. Claimant was released at maximum medical improvement on October 8, 1997.

As claimant continued working he had ongoing pain and was diagnosed with reflex sympathetic dystrophy. Claimant received Bier block treatment on two occasions which each provided relief for about six months. Claimant also began to experience problems with his fourth toe curling downward. On May 12, 2000, Dr. Horton performed surgery to clip a tendon in claimant's fourth toe in order to allow the toe to straighten.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On November 9, 2004, claimant returned to see Dr. Horton with complaints that the fourth toe was curling under the third toe and the fifth toe was also somewhat deformed. A further surgical procedure to straighten the fourth and fifth toes was discussed. The doctor further prescribed orthotics consisting of a boot with a steel shank and a carbon fiber inlay and rocker.

Claimant complains of constant pain in his left foot which varies in intensity and nature. He further notes that he has swelling dependent upon how much he is on his feet and the type of surfaces that he walks on. Claimant is self employed and continues to work in the construction industry primarily performing sheetrocking.

Dr. Horton opined claimant suffered a 25 percent functional impairment to his left foot. The doctor explained that his rating included the claimant's residual neurogenic problems and the stiffness in his toes. The doctor testified:

Q. Of the foot. And could you explain how you reached that number?

A. Well, this is an injury that is not -- it's somewhat difficult to rate with exactness, but there's several different ways that this thing could be addressed.

I think that the note says that I referred to Tables 45 and 68 of the AMA Guides. I've looked at that, and that is one reasonable way to do that. He can be judged on the amount of stiffness that he has in his toes, combined with the residual neurogenic problems that he has. Mainly those are dysesthesias, or burning sort of numbness in the foot. He had some residual burning on the top of the foot where he was crushed, and then in the nerves on the bottom of the foot in that region.

So those are the two main things that take into account the rating, and that would be the -- largely the toe deformities that are left and the residual neurogenic pain, and that's what I included.²

Dr. Horton further opined that if claimant had the additional recommended surgery for his fourth and fifth toes his functional impairment rating would not increase and could possibly decrease.

The claimant's attorney arranged for Dr. Theodore L. Sandow to examine claimant on June 22, 2005, and provide an impairment rating. Dr. Sandow diagnosed claimant with a crush injury to the left foot with open fractures of the left first, fourth and fifth metatarsals, with persistent metatarsalgia and causalgia. The doctor opined claimant suffered a 52 percent functional impairment to the lower extremity and explained that he specifically used tables 68, 64, 61, 45, 11 and the combined values table of the AMA *Guides* to arrive at his impairment rating. The doctor further opined that if claimant had the additional surgery for

² Horton Depo. at 7.

his fourth and fifth toes it would not change his impairment rating. Finally, the doctor agreed claimant's impairment was limited to his foot.

On cross examination Dr. Sandow was asked how he arrived at a 15 percent impairment from table 61 and was unable to explain how he arrived at that number.

It is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.³ In this instance, the claimant complains of left foot problems, Dr. Horton treated and rated the left foot and Dr. Sandow agreed claimant's impairment was limited to the left foot. Accordingly, claimant is entitled to benefits limited to a scheduled disability to the left foot.

The record contains ratings from Drs. Horton and Sandow. Both doctors based their ratings upon the *AMA Guides*. The ALJ adopted the treating physician's opinion and disregarded the claimant's medical expert's opinion.

Both doctors recited that their ratings were based upon the *AMA Guides*. But as previously noted, Dr. Sandow was unable to explain how he arrived at a number he used when it did not correspond to the table of the *AMA Guides* he cited. Moreover, Dr. Sandow rated the lower extremity but agreed claimant's impairment was limited to his left foot.

It appears the ALJ went to the *AMA Guides* and independently interpreted and cited portions of the *AMA Guides*. Because a decision must be made based upon the evidence introduced before the ALJ, the Board concludes it should not go outside the record to interpret the *AMA Guides* in that manner. Nonetheless, the record supports a finding that Dr. Horton's opinion, in this instance, is more persuasive than Dr. Sandow. Accordingly, the Board affirms the ALJ's Award.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 7, 2006, is affirmed.

IT IS SO ORDERED.

³ *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

Dated this _____ day of August 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew J. Hempy, Attorney for Respondent and its Insurance Carrier
Director & ALJ's file